Supreme Court, U.S.
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No. 01-1499

In The Supreme Court of the United States

KIT CARSON,

Petitioner,

v.

NEWS-JOURNAL CORPORATION AND TIPPEN DAVIDSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Florida

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PARTIES TO THE PROCEEDING

In addition to the parties listed on the cover page, there were initially nine other named defendants, all individuals, as well as a category of defendants Petitioner referred to as "Other Defendants as Yet Unnamed". The named individuals, who at the time of the complaint were officers and employees of Respondent News-Journal Corporation, are: Georgia Kaney, Dick Dunkel, Don Lindley, Natalie Dix, Pamela Hasterok, Mark Lane, Larry Allen, Denise O'Toole and Molly Justice. On April 22, 1999, the trial court entered an order dismissing the complaint as to the named individual defendants other than Respondent Tippen Davidson. That order was not appealed.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent News-Journal Corporation states that PMV, Inc., a closely held Florida corporation, owns fifty-two and a half percent of the outstanding voting common stock of News-Journal Corporation. Cox Communications, Inc., also a closely held corporation, holds the remaining forty-seven and a half percent of stock.

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OPINIONS BELOW

Petitioner's "Opinions Below" section referenced the Florida state appellate court decisions but did not provide a citation to the decision of the Florida Supreme Court dismissing Petitioner's petition for discretionary review (Appendix 1). That decision is reported in a table at *Carson v. News-Journal Corporation*, 805 So.2d 805 (Fla. 2002). In addition to the decisions referenced by Petitioner, the first decision in the proceedings below was the final summary judgment (Appendix 2) entered by the Circuit Court, Seventh Judicial Circuit of Florida on June 13, 2000.

STATEMENT OF THE CASE

Background

Petitioner is a member of the Florida Bar and, in 1996, was an unsuccessful candidate for the Office of Public Defender in the Seventh Judicial Circuit of Florida. In 1998, he was an unsuccessful candidate for County Judge in Volusia County, Florida. Petitioner ran against incumbents both times. (Appendix 2).

Following his defeat at the polls in 1998, Petitioner sued Respondent News-Journal Corporation, the publisher of *The News-Journal*, a morning daily newspaper of general circulation in Volusia and Flagler Counties, Florida, and Respondent Tippen Davidson, the chief executive officer of News-Journal Corporation. Petitioner sued Respondents because he believes *The News-Journal* libeled him in its news coverage and editorial commentary

concerning his campaigns. *The News-Journal* endorsed the incumbents in both elections. (Appendix 2).

Proceedings Below

Petitioner complained that fourteen (14) separate statements contained in editorials and news stories concerning his races for public office libeled him and even caused him to lose the race for county judge. (Appendix 3). Respondents responded by filing a moving paper setting forth motions to strike, to dismiss and for partial summary judgment. The grounds for the motions to dismiss were that certain complained of statements were not susceptible of defamatory meaning and that certain complained of statements were expressions of pure opinion. The grounds for the motion for partial summary judgment were that certain complained of statements were privileged as fair reports of official records. Taken together, these motions raised defenses to each of the complained of statements. (Appendix 2).

On June 13, 2002, the Circuit Court, Seventh Judicial Circuit of Florida, entered its final summary judgment in favor of Respondents. (Appendix 2). Petitioner appealed the judgment as to Statements 2, 3[a], and 4 through 14, but did not appeal as to Statements 1, 3[b], and 3[c]. The final summary judgment was affirmed by the Florida Fifth District Court of Appeal on June 15, 2001. The Fifth District's opinion is reported at *Carson v. News-Journal Corporation*, 790 So.2d 1120 (Fla. 5th DCA 2001). On January 9, 2002, the Florida Supreme Court dismissed Petitioner's petition to invoke discretionary jurisdiction. The Florida Supreme Court's decision is reported in a

table at *Carson v. News-Journal Corporation*, 805 So.2d 805 (Fla. 2002).

Petitioner's Statement of the Case

Petitioner's statement of the case is improper and serves no useful purpose in this appeal. It is rambling, argumentative, hopelessly subjective, and largely irrelevant. It sets forth a mixture of facts including: (1) facts alleged in his complaint; (2) facts supported by record evidence; (3) undisputed facts; and (4) disputed facts which were neither alleged in the complaint nor supported by record evidence. It fails, however, to distinguish between facts relevant to review of the orders of dismissal and those relevant to the partial summary judgment.

Facts Pertinent to Review of Orders Dismissing Claims for Failure to State a Cause of Action

The complaint alleges that Petitioner ran unsuccessful races for public defender in 1996 and for county judge in 1998 and that in its news coverage and editorial commentary on these races, Respondents published certain false and defamatory statements concerning Petitioner. The complaint, through its attachments, alleges the text of the statements upon which the claims of libel are grounded, and it alleges the full text of the news stories and editorials within which the alleged libels were published. (Appendix 3).

The dismissal of Statements 2, 3[a], 4[a], 9, 10, 11, 12 and 13 for failure to state a cause of action can be reviewed solely on the basis of these allegations.

Summary of Facts Relevant to the Fair Report Issue

The trial court entered summary judgment on Statements 4[b], 5, 6, 7, 8 and 14 on the grounds those statements were privileged reports of government records. The summary judgment record consists of the complaint and the affidavits. The following summarizes this record.

Lake City Dismissal

Respondent reported on three occasions that Petitioner had been discharged from his position as assistant public defender for the Third Circuit in Lake City for "unsatisfactory work performance". This report was based on records obtained from Petitioner's personnel file maintained by his former employer. From this file, Respondents obtained a copy of a document submitted by the public defender to the state Bureau of Unemployment Compensation (the "UC Bureau"). In this report, Public Defender Milo Thomas stated:

> [Petitioner's] performance in this office was, in my opinion, very unsatisfactory and I, therefore, terminated his employment on March 15, 1985. Prior to working for me, he advised me that he had worked for the State Attorney in Tavares, Florida. He stated that he did not like the State Attorney down there and did not like the way that he ran his office so he, therefore, resigned. I realize now that I should have talked to the State Attorney before I employed this man.

This statement was contained within a copy of a document which showed that the UC Bureau had determined Petitioner's discharge was "for reason other than

misconduct connected to work" and therefore awarded him unemployment compensation. Respondents did not report this or any other fact concerning the application for unemployment compensation.

Petitioner's affidavits state that in 1998 he told reporters and editors that the public records of his dismissal were false. He said he was dismissed because of controversy arising from his resignation from the state attorney's office in Tavares. He also made the newspaper aware of the outcome of his UC claim, informing them that this award "acquitted" him.

The newspaper did not go behind the public records to investigate Petitioner's claims and it did not report Petitioner's contentions.

Daytona Beach Dismissal

With respect to his dismissal by the Attorney General's office, the newspaper reported that Petitioner had been dismissed "for allegedly refusing to perform the assigned work." This statement was contained within a copy of a document obtained from Petitioner's personnel records at the Attorney General's office which showed that Petitioner received unemployment compensation. The same document also reflected that, for purposes of unemployment compensation benefits, Petitioner was dismissed "for reason other than misconduct connected with the work".

Petitioner's affidavits state that in 1998, he denied to the newspaper that he had refused to perform assigned work at the Attorney General's office. He relied on his UC award as proof of that fact, saying again that it vindicated

and acquitted him of his employer's stated reason for dismissal.

The newspaper did not go behind the public records of his employment to investigate Petitioner's denial, and aside from reporting that he claimed his dismissal was a "political shenanigan", it did not report Petitioner's contentions.

Attorney General Employment Evaluations

In an article published on August 24, 1998, Respondents reported from public records that "A 1986 evaluation said Carson achieved performance standards and exceeded in several areas such as professional attitude and cooperation. However, his next evaluation said he barely achieved performance standards and rated below average on professional attitude and cooperation." In an article published on September 2, 1998, Respondents reported that Petitioner had been "discharged [from the Attorney General's Office] after a poor work evaluation."

These reports were based on documents found in Petitioner's personnel file at the Attorney General's office. That file contains evaluations covering the period from October 1, 1985, through April 1, 1986, and the period from October 1, 1986, through October 1, 1987. Petitioner contends there was an evaluation for the period between April 1, 1986, and October 1, 1986, which also found his work satisfactory. Respondents admitted this fact for purposes of summary judgment.

Petitioner's affidavits state that he told the newspaper that the 1987 evaluation was "a false evaluation of [his] performance" because it was "ghost written by a rival in

the Attorney General's office." If the assistant who supervised him during the first evaluation period had performed the evaluation in 1987, it "would have been at least consistent with the two previous evaluations."

Respondents did not go behind the public records to investigate Petitioner's contentions, nor did it publish his contentions that he was "vindicated" by his award of unemployment compensation.

REASONS FOR DENYING THE PETITION

Both lower courts that rendered decisions on the merits found that the complained of statements were either expressions of pure opinion, not susceptible of defamatory meaning, or privileged reports of government records. In his attempt to articulate some issue warranting review by this Court, Petitioner poses a series of questions he asserts arise from those decisions. Those questions are: (1) the Florida court decisions conflict with the decisions of this Court in *Curtis Publishing Co. v. Butts*, 388 U.S. 130 (1967), and *Harte-Hanks Communications, Inc. v. Connaughton,* 491 U.S. 657 (1989); (2) the Florida decisions conflict with the decision of this Court in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990); (3) the scope of a judicial candidate's free speech rights; (4) whether Respondents waived the protections afforded defamation defendants under this Court's decision in *New York Times Company v. Sullivan*, 376 U.S. 254 (1964); and (5) whether this Court should revisit its *New York Times* decision.

Petitioner seeks to invoke this Court's discretionary jurisdiction under 28 U.S.C. § 1257(a). The Petition should

be denied because none of the bases for discretionary jurisdiction under 28 U.S.C. § 1257(a) are present in this case.

Assuming *arguendo* discretionary jurisdiction exists, neither the record nor the decisions below raise the questions posed by Petitioner. The state court decisions do not conflict with this Court's decisions in *Curtis, Harte-Hanks* or *Milkovich*. Moreover, neither the issues of actual malice nor judicial candidate free speech were implicated by the decisions below.

There are no compelling reasons for the Court to review this case.

I.

THIS COURT DOES NOT HAVE JURISDICTION

Petitioner seeks to invoke this Court's jurisdiction under 28 U.S.C. § 1257(a). 28 U.S.C. § 1257(a) confers upon this Court discretionary jurisdiction to review final decisions by the highest state courts when the validity of a federal treaty or statute is drawn into question, where a state statute is drawn into question on the ground it is repugnant to federal law, or where any title, right, privilege or immunity is claimed under federal law. The Petition should be denied because none of the bases for discretionary jurisdiction under 28 U.S.C. § 1257(a) are present in this case.

Petitioner does not contend that the state court decisions question the validity of a federal treaty or statute, nor does Petitioner contend that a state statute is drawn into question on the ground it is repugnant to

federal law. Instead, Petitioner relies upon the actual malice standard set forth in this Court's *New York Times* decision as constituting the "title, right, privilege, or immunity" claimed under federal law. This reliance is misplaced.

The action below was a state court common law tort action for defamation. Respondents did not raise the actual malice defense in the proceedings below. On the contrary, Respondents successfully defended on the bases that (1) certain statements were non-defamatory expressions of pure opinion; (2) certain statements were not susceptible to a defamatory meaning; and (3) certain statements were protected by the state common law fair reports privilege. This is not a First Amendment case.

II.

THE STATE COURT DECISIONS DO NOT CONFLICT WITH THIS COURT'S DECISIONS IN *CURTIS* OR *HARTE-HANKS*

Petitioner argues that this Court should exercise its discretionary jurisdiction to review the state court decisions because they conflict with this Court's decisions in *Curtis* and *Harte-Hanks*. Petitioner's argument is without merit. Both *Curtis* and *Harte-Hanks* were actual malice cases. This case is not. Respondents never raised the defense of actual malice. On the contrary, Respondents defended on the grounds that the complaint failed to state a cause of action as to certain of the statements because they were not defamatory as a matter of law or because they were expressions of pure opinion. Respondents defended against the remaining statements on the grounds that they were privileged as fair reports of

government records. Actual malice has no bearing on any of these defenses.

Petitioner incorrectly argues that actual malice defeats the state common law fair reports privilege. That privilege covers the publication of contents of an official document, so long as the account is accurate and complete or a fair abridgement of the occurrence reported. *Stewart v. Sun-Sentinel Company*, 695 So.2d 360 (Fla. 4th DCA), *rev. denied,* 697 So.2d 512 (Fla. 1997); *Woodard v. Sunbeam Television Corp.*, 616 So.2d 501 (Fla. 3rd DCA 1993); *Ortega v. Post-Newsweek Stations, Florida, Inc.*, 510 So.2d 972 (Fla. 3rd DCA), *rev. denied,* 518 So.2d 1277 (Fla. 1989); *Jamason v. Palm Beach Newspapers, Inc.*, 450 So.2d 1130 (Fla. 4th DCA 1984); and *Huzar v. Gross*, 468 So.2d 512 (Fla. 1st DCA 1985). The privilege is conditioned only upon the accuracy of the report of the record.

Actual malice does not defeat the privilege because the privilege is conditioned solely on the accuracy of the report. *Jamason*, 450 So.2d at 1132. In *Ortega*, the plaintiff argued as an "ultimate fall-back position that the [defendant] knew or should have known that the [official information was] untrue." The court flatly rejected this argument, holding:

> Even if this were the case, [plaintiff] cannot prevail. The privilege to report on official proceedings exists so that the public may be kept informed of the workings of government. That purpose is served, notwithstanding any inaccuracy of the information, when the information brought out in official proceedings is reported. [T]here can be no liability on the part of the [press] for republishing the contents of an official document, so long as their account is reasonably

> accurate and fair. (citation omitted). The press has no duty to go behind statements made at official proceedings and determine their accuracy.

Id. at 1133.

In full accord with these cases, *Woodard*, cited Restatement (Second) Torts, § 611 and held that "if the report of a public official proceeding is accurate or a fair abridgment, an action cannot constitutionally be maintained . . . for defamation . . . " *Id.* at 503. Actual malice is simply irrelevant to an accurate report or fair summary of an official record.

Accordingly, actual malice does not provide a federal question basis to review the fair report defense.

Moreover, the Florida district court correctly upheld the trial court entry of summary judgment on Statements 4[b], 5, 6, 7, 8 and 14 on the basis that the statements constituted fair and accurate reports of public records concerning Petitioner's employment history. The district court held that the newspaper had no duty to report that Petitioner received unemployment compensation. "The focus of the News-Journal's reports was an explanation from Carson's former employers of the reasons for his discharge, not whether Carson was entitled to receive unemployment compensation benefits in connection with his discharge from such employment." *Carson* at 1122.

The district court also rejected Petitioner's theory that an award of unemployment compensation somehow acquitted him of his employers' stated reasons for termination. Petitioner challenges this portion of the district court's opinion by arguing that it invades the province of the jury. Petitioner's argument in this regard

demonstrates a continued misunderstanding of the nature and scope of the fair reports privilege. To determine whether a published statement is a fair abridgment of a public record, it is only necessary to compare the publication with the public record. *Stewart* at 362. It is a question of law whether this comparison shows the published statement is a fair abridgement of the underlying record, and the fair reports privilege therefore properly may be determined by summary judgment when the public record is in evidence. *Stewart*; *Ortega*.

III.

THE STATE COURT DECISIONS DO NOT CONFLICT WITH THIS COURT'S DECISION IN *MILKOVICH*

Petitioner argues that the decisions below conflict with this Court's decision in *Milkovich*. Petitioner's argument is without merit. The final summary judgment granted Respondents' motion to dismiss Statements 1, 2, 3[a], 4[a], 10, 11, 12 and 13 on the basis that the statements were expressions of pure opinion. This decision does not conflict with *Milkovich*. Consistent with *Milkovich*, the trial court concluded as a matter of law that these statements were "expressions of pure opinion based upon facts which are set forth in the article in which they appear and therefore do not imply the allegation of undisclosed defamatory facts as the basis for the opinion." (Appendix 2).

The trial court properly applied the common law privilege of fair comment to the expression of opinion and not to a false statement of fact. *See Milkovich* at 14 ("[U]nder the common law, the privilege of 'fair comment'

was the device employed to strike the appropriate balance between the need for vigorous public disclosure and the need to redress injury to citizens wrought by invidious or irresponsible speech").

Accordingly, the opinion defense does not provide a federal question basis for this Court's discretionary jurisdiction.

IV.

NEITHER THE RECORD NOR THE DECISIONS BELOW RAISE THE QUESTION OF JUDICIAL CANDIDATE FREE SPEECH

In a blatant attempt to grab this Court's attention, Petitioner asserts that this case raises the judicial candidate free speech issue currently pending before this Court in *Republican National Committee v. Kelly*, No. 01-521, argued March 26, 2002. Petitioner's assertion is silly. Whether the First Amendment protects a judicial candidate from adverse state action due to his campaign related speech has nothing to do with whether a newspaper can publish opinions concerning the candidate's judicial speech. Petitioner's argument that the newspaper violated his First Amendment rights by publishing statements concerning his campaign is simply without merit. There is no state action of any kind. In ruling in favor of Respondents, the lower courts did not deprive Petitioner of any First Amendment right. Neither court purported to punish or proscribe Petitioner's campaign related speech and neither court otherwise impaired Petitioner's right to say anything he wants about anything. The courts merely held that Respondents did nothing wrong by making statements concerning Petitioner's campaign related speech.

Neither the record nor the decisions below raise a judicial candidate free speech issue.

V.

THE *NEW YORK TIMES* STANDARD IS NOT IMPLICATED IN THIS CASE

Petitioner argues that Respondents waived the protection of this Court's *New York Times* standard when it published a statement explaining why it endorses candidates. Petitioner further argues that the *New York Times* standard should be revisited. Petitioner's arguments are irrelevant. Neither the record nor the decisions below raise the question of actual malice. Respondents never raised the actual malice defense and it is not otherwise relevant to issues raised by Respondents' motions to dismiss and for summary judgment. Simply put, actual malice has no bearing on this case. Accordingly, neither do Petitioner's arguments concerning actual malice. Actual malice does not provide a federal question basis for this Court's discretionary review.

Moreover, Petitioner is wrong to argue that Respondents waived the actual malice defense by publishing a statement explaining why it endorses candidates. If Respondents had wanted to defend on the basis of the actual malice standard, they could have done so. The published statement evidences no intention to waive any rights. Wavier is the intentional or voluntary relinquishment of a known right or conduct from which it is possible to infer the intent to voluntarily relinquish the known right. *Taylor v. Kenco Chemical & Mfg. Corp.*, 465 So.2d 581 (Fla. 1st DCA 1985). When waiver is alleged to be implicit in action, "the acts, conduct, or circumstances

relied upon to show waiver must make out a clear case." *Id.* The stated intention to conduct news gathering activities cannot imply a waiver of the protection afforded by law for publishing the fruits of such activities. The cases cited by Petitioner do not support his argument. No case has ever found such a waiver.

CONCLUSION

The Petition fails to demonstrate any valid ground for review of the decisions below, and should be denied.

Respectfully submitted,

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APPENDIX 1

(The decision of the Supreme Court of Florida is referenced in the Southern Reporter in a table captioned 'Florida Decisions Without Published Opinions.')

Supreme Court of Florida.

Kit Carson

v.

News-Journal Corporation

NO. SC01-2056

January 09, 2002

Appeal From: 5th DCA, 790 So.2d 1120

Disposition: Dism.

APPENDIX 2

IN THE CIRCUIT COURT,
SEVENTH JUDICIAL CIRCUIT,
IN AND FOR VOLUSIA
COUNTY, FLORIDA

CASE NO. 98-32413 CICI
DIVISION 31
HON. JOSEPH G. WILL

KIT CARSON,

Plaintiff,

vs.

NEWS-JOURNAL CORPORATION, et al.,

Defendants.

_____/

FINAL SUMMARY JUDGMENT

THIS CAUSE came to be heard on motions to strike, to dismiss, and for summary judgment filed in this matter on February 26, 1999, by the defendants in a moving paper styled, DEFENDANTS' MOTIONS TO STRIKE, MOTIONS TO DISMISS, AND MOTIONS FOR SUMMARY JUDGMENT AND MEMORANDA OF LAW IN SUPPORT THEREOF ("Defendants' Motions"). The Court heard arguments of counsel in hearings conduct in chambers on April 15, 1999, July 19, 1999, July 22, 1999, and September 2, 1999. The Court has considered the defendants' written motions and several memoranda of law in support thereof together with the affidavits and other evidence submitted in support of the Defendants' Motions as well as the written responses, memoranda, and

affidavits, filed by the plaintiff in opposition to Defendants' Motions. The Court being duly advised in the premises is now entering this final summary judgment as follows:

SUMMARY OF THE RELEVANT FACTS AND CIRCUMSTANCES

The Complaint

The plaintiff, Kit Carson ("Carson"), is a resident of Volusia County and member of the Florida Bar. Complaint, ¶ 1; Exhibit A. In 1996, Carson was an unsuccessful candidate for the office of Public Defender in the Seventh Judicial Circuit (Complaint, ¶ 17), and in 1998, he was an unsuccessful candidate for County Judge in Volusia County. Complaint, ¶¶ 20, 30.

The defendants are a corporation and several individuals. Carson sued the NEWS-JOURNAL CORPORATION ("News-Journal"), the publisher of *The News-Journal*, a morning daily newspaper circulating within Volusia and Flagler Counties. Complaint, ¶ 3. Carson also sued many individuals who are officers and employees of News-Journal, to wit: TIPPEN DAVIDSON, GEORGIA KANEY, DICK DUNKEL, DON LINDLEY, NATALIE DIX, PAMELA HASTEROK, MARK LANE, LARRY ALLEN, DENISE O'TOOLE, and MOLLY JUSTICE. Complaint, ¶ 4-14. Carson also sued additional unknown individuals whom he identifies as "OTHER DEFENDANTS AS YET UNNAMED". Complaint, p. 1.

Carson complains that certain statements in editorials and news stories concerning his races for public

defender and county judge libeled him and caused him to lose the race for county judge.

Before filing the suit, Carson served two notices pursuant to Section 770.01, Florida Statutes, on News-Journal. Each notice is attached to the complaint and serves as the only allegation concerning the allegedly false and defamatory statements. *See* Complaint, Exhibit B (letter of October 16) and Complaint, Exhibit G (Letter of October 20). In these letters, Carson sets out fourteen statements that are alleged to be false and defamatory. Although the complaint is a one-count complaint, each of these fourteen statements represents a separate claim.

The fourteen statements are as follows:

No.	Statement Text
1.	Kit Carson's complaint is less with the quality of service Gibson provides than with Gibson's reluctance to try to squeeze more money out of the office's indigent clients. *Complaint, Exhibit B, ¶ 1.*
2.	Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue against their clients before a judge to secure fees. *Complaint, Exhibit B, ¶ 2.*
3.	[a] In addition to his misguided emphasis on fee collection, Carson lacks other important qualifications. [b] He has no experience managing employees. [c] He is unprepared for the largely administrative job.

Complaint, Exhibit B, ¶ 3.

4. [a] Carson's record of employment in the justice system, which ended about six years ago, is unimpressive.

   [b] [H]e was fired by the state Attorney General's Office in Daytona Beach in February 1988 for "allegedly refusing to perform the assigned work," according to state record.

   Complaint, Exhibit B, ¶ 4.

5. He was fired by the public defender in Florida's 3rd Judicial Circuit after only six weeks in 1985 for "unsatisfactory work performance," records show. *Complaint, Exhibit B, ¶ 5.*

6. According to public records, Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. He worked there for a month in 1985. *Complaint, Exhibit G, ¶ 1(a).*

7. Carson also worked at the local Attorney General's Office for more than two years before he was dismissed in 1998. A 1986 evaluation said Carson achieved performance standards and exceeded in several areas such as professional attitude and cooperation. However, his next evaluation said he barely achieved performance standards and rated below average on professional attitude and cooperation. *Complaint, Exhibit G, ¶ 1(b).*

8. In the mid to late 1980s, Carson was discharged or dismissed from his jobs with the Public Defender's Office in Lake City and

the Attorney General's Office in Daytona Beach. Public records show Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. Carson was discharged for allegedly refusing to perform the assigned work, records show. *Complaint, Exhibit G, ¶ 2(a).*

9. The judge also feels that Carson's promises create an appearance that he's predisposed about drug cases and that defendants would not be subjected to a fair and impartial judiciary if Carson were elected to county judge. *Complaint, Exhibit G, ¶ 2(b).*

10. This campaign promise comes uncomfortably close to violating judicial ethics guidelines on prejudging cases. *Complaint, Exhibit G, ¶ 3(a).*

11. Carson simply blows off any ethical concerns by asserting free-speech rights. *Complaint, Exhibit G, ¶ 3(b).*

12. Carson's anti-drug pledge is also misleading. *Complaint, Exhibit G, ¶ 3(c).*

13. Florida's judicial ethics also bar candidates from asking for donations. Yet Carson's own campaign brochure, paid for by Carson as treasurer, asks people to "Contribute funds to the Kit Carson for Judge Campaign." Carson's' "zero tolerance" looks more like "zero ethics." *Complaint, Exhibit G, ¶ 3(d).*

14. He ran unsuccessfully against Gibson in 1989 and 1996. Carson also worked for the Public Defender's Office in Lake City briefly in 1985 before being discharged for unsatisfactory work performance. Carson worked

> for the local office of the state attorney general for more than two years before being discharged in 1988 after a poor work evaluation. *Complaint, Exhibit G,* ¶ *4.*

Hereafter, these fourteen statements are referred to collectively as the "Statements" and separately as "Statement X," where X stands for the ordinal number assigned to the Statement in this listing.

Carson also made general allegations of defamation in each of his presuit letters. In Exhibit B, he stated, "The editorial, as a whole, is libelous." In Exhibit G, he stated, "The editorial and articles, as a whole, are libelous."

Defendant's Motions

The defendants responded to the complaint by filing a moving paper setting forth a series of motions to strike, to dismiss, and for partial summary judgment. These motions raised various defenses to the complaint against individual defendants and against the claims based on the allegedly false and defamatory Statements.

On the basis of a motion made by all individual defendants other than TIPPEN DAVIDSON (the "Unnoticed Defendants"), the Court entered an order on April 22, 1999, dismissing the complaint as against the Unnoticed Defendants for failure to comply with the condition precedent set forth in section 770.01, Florida Statutes (1997).

As relevant to this final summary judgment, News-Journal and TIPPEN DAVIDSON moved to strike and dismiss the complaint based on three distinct defenses. In Motion IV, the defendants asserted that one group of

Statements (Statements 1, 2, 3, and 11) were not defamatory as a matter of law because these statements were not susceptible of a defamatory meaning. In Motion V, the defendants asserted that a second group of Statements (Statements 2, 3[a], 4[a], 9, 10, 12, and 13) were not defamatory as a matter of law because these statements were expressions of pure opinion. In Motion VI, the defendants asserted that a third group of Statements (Statements 4[b], 5, 6, 7, 8, and 14) were privileged as fair reports of official records, submitted affidavits and authenticated copies showing the relevant records, and moved for partial summary judgment as to these statements. Taken together, these three motions raise defenses to each and every one of the allegedly false and defamatory statements.

Findings and Conclusions

The Court now FINDS that Carson has not amended his complaint as permitted by the April 22, 1999, order, that the time for such an amendment has long since passed, and that Carson has previously stated on the record that he did not intend to effect any such amendment. The Court has now concluded that the Unnoticed Defendants are entitled to judgment as a matter of law on the basis of the order of April 22, 1999.

The Court has further found and concluded that all defendants are entitled to judgment as a matter of law as to each and every claim asserted in the complaint, including all claims based on the allegedly false and defamatory Statements on the basis of one or more of these three defenses. Accordingly, the Court is now entering its Final Summary Judgment for the defendants and dismissing the complaint with prejudice.

Orders

It is therefore ORDERED as follows:

1. The motion styled, "Motion II. Motion of all Defendants to Strike from the Complaint Legally Insufficient Allegations in Statutory Presuit Notice," is GRANTED, and therefore:

A. The Court strikes from the Complaint, Exhibit B, the sentence, "The editorial, as a whole, is libelous," and the Court dismisses for failure to state a cause of action the claim for libel grounded on this statement.

B. The Court strikes from the Complaint, Exhibit G, the sentence, "The editorial and articles, as a whole, are also libelous," and the Court dismisses for failure to state a cause of action the claim for libel grounded on this statement.

C. In granting this motion, the Court has not precluded itself, nor either party, from referring to the entire articles within which the alleged libels were published fro the context of the article.

2. The motion styled, "Motion III. Motion of all Defendants to Strike From the Complaint Certain Immaterial, Redundant, and Impertinent Allegations," is GRANTED pursuant to the stipulation and agreement of counsel for News-Journal and Mr. Carson, and therefore:

A. The Court strikes from paragraph 25 of the complaint, the word MALICIOUSLY.

B. The Court strikes paragraph 26 in its entirety from the complaint.

3. The motion styled, "Motion IV. Motion of all Defendants to Strike and Dismiss Statements Not Defamatory as Matter of Law Because Not Susceptible of Defamatory Meaning: Statements, 1, 2, 3, and 11" is GRANTED IN PART. The Court concludes as a matter of law that the following statements are not reasonably susceptible of defamatory meaning because they have no tendency to harm the reputation of Mr. Carson so as to lower him in the estimation of the community or deter third parties from dealing with him nor otherwise to defame him, *viz*:

> Statement 2:
>
> Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue against their clients before a judge to secure fees.
>
> Statement 3[b]:
>
> He has no experience managing employees.
>
> Statement 3[c]:
>
> He is unprepared for the largely administrative job.
>
> Statement 11:
>
> Carson simply blows off any ethical concerns by asserting free-speech rights.

Therefore:

A. Statements 1, 2, 3[b], and 3[c] are stricken from the Complaint, Exhibit B, and the cause of action for

libel based on the publication of these statements is dismissed with finality.

B. Plaintiff shall not have leave to amend the complaint as to Statements 1, 2, 3[b], and 3[c].

4. The Motion styled, "Motion V. Motion of all Defendants to Strike and Dismiss Statements Not Defamatory as a Matter of Law Because They are Expressions of Pure Opinion," is GRANTED IN PART. The Court concludes as a matter of law that the following statements are not defamatory as a matter of law because they are expressions of pure opinion based on facts which are set forth in the article in which they appear and therefore do not imply the allegation of undisclosed defamatory facts as the basis for the opinion, *viz*:

> Statement 1:
>
> Kit Carson's complaint is less with the quality of service Gibson provides than with Gibson's reluctance to try to squeeze more money out of the office's indigent clients.
>
> Statement 2:
>
> Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue against their clients before a judge to secure fees.
>
> Statement 3[a]:
>
> In addition to his misguided emphasis on fee collection, Carson lacks other important qualifications.

Statement 4[a]:

Carson's record of employment in the justice system, which ended about six years ago, is unimpressive.

Statement 90:

The judge also feels that Carson's promises create an appearance that he's predisposed about drug cases and that defendants would not be subjected to a fair and impartial judiciary if Carson were elected to county Judge.

Statement 10:

This campaign promise comes uncomfortably close to violating judicial ethics guidelines on prejudging cases.

Statement 11:

Carson simply blows off any ethical concerns by asserting free-speech rights.

Statement 12:

Carson's anti-drug pledge is also misleading.

Statement 13:

Florida's judicial ethics also bar candidates from asking for donations. Yet Carson's own campaign brochure, paid for by Carson as treasurer, asks people to "Contribute funds to the Kit Carson for Judge Campaign." Carson's "zero tolerance" looks more like "zero ethics."

Therefore:

A. Statements 1, 2, 3[a], 4[a], 9, 10, 11, 12, and 13 are stricken from the Complaint, Exhibit B, and the causes of action for libel based on the publication of these statements is finally dismissed.

B. Plaintiff may not amend the complaint as to these Statements 1, 2, 3[a], 4[a], 9, 10, 11, 12, and 13.

5. The Motion styled, "Motion VI. Motion of all Defendants for Partial Summary Judgment As to Statement 4[b], 5, 6, 7, 8, & 14 on the Ground That the Same are Privileged as Fair Report of Public Records" is GRANTED. The Court finds and concludes that there is no genuine issue of any material fact with respect to this defense, that each Statement to which this motion pertains is a fair and accurate report of public records concerning the employment history of the plaintiff, and that defendants are therefore entitled to judgment as a matter of law as to each of the following Statements:

> Statement 4[b]:
>
> [H]e was fired by the state Attorney General's Office in Daytona Beach in February 1988 for "allegedly refusing to perform the assigned work," according to state records.
>
> Statement 5:
>
> He was fired by the public defender in Florida's 3rd Judicial Circuit after only six weeks in 1985 for "unsatisfactory work performance," records show.

Statement 6:

According to public records, Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. He worked there for a month in 1985.

Statement 7:

Carson also worked at the local Attorney General's Office for more than two years before he was dismissed in 1988. A 1986 evaluation said Carson achieved performance standards and exceeded in several areas such as professional attitude and cooperation. However, his next evaluation said he barely achieved performance standards and rated below average on professional attitude and cooperation.

Statement 8:

In the mid to late 1980s, Carson was discharged or dismissed from his jobs with the Public Defender's Office in Lake City and the Attorney General's Office in Daytona Beach. Public records show Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. Carson was discharged for allegedly refusing to perform the assigned work, records show.

Statement 14:

He ran unsuccessfully against Gibson in 1989 and 1996. Carson also worked for the Public Defender's Office in Lake

City briefly in 1985 before being discharged for unsatisfactory work performance. Carson worked for the local office of the state attorney general for more than two years before being discharged in 1988 after a poor work evaluation.

Judgment

NOW, THEREFORE, it is hereby Adjudged that plaintiff, KIT CARSON, take nothing by this action and that defendants, NEWS-JOURNAL CORPORATION, TIPPEN DAVIDSON, GEORGIA KANEY, DICK DUNKEL, DON LINDLEY, NATALIE DIX, PAMELA HASTEROK, MARK LANE, LARRY ALLEN, DENISE O'TOOLE, and MOLLY JUSTICE, go hence without day. The Court retains jurisdiction to assess costs and any allowable attorneys' fees.

DONE, ORDERED, AND AJUDGED in Chambers in Daytona Beach, Volusia County, Florida, this 13th day of June, 2000.

/s/ Joseph G. Will
Hon. Joseph G. Will,
Circuit Judge

Conformed copies to:
Jonathan D. Kaney Jr., Esq.
Kevin Kitpatrick Carson, Esq.

APPENDIX 3

IN THE CIRCUIT COURT, SEVENTH JUDICIAL CIRCUIT, IN AND FOR VOLUSIA COUNTY, FLORIDA

CASE NO. ___

KIT CARSON,

Plaintiff,

v.

NEWS-JOURNAL CORPORATION, TIPPEN DAVIDSON, GEORGIA KANEY, DICK DUNKEL, DON LINDLEY, NATALIE DIX, PAMELA HASTEROK, MARK LANE, LARRY ALLEN, DENISE O'TOOLE, MOLLY JUSTICE, et al,

Defendants.

_____/

COMPLAINT – LIBEL

(Filed Oct. 28, 1998)

Plaintiff, KIT CARSON, hereinafter referred to as "Plaintiff" sues Defendant NEWS-JOURNAL CORPORATION, hereinafter referred to as Defendant News-Journal or newspaper, Defendant TIPPEN DAVIDSON, Defendant GEORGIA KANEY, Defendant DICK DUNKEL, Defendant DON LINDLEY, Defendant NATALIE DIX, Defendant PAMELA HASTEROK, Defendant MARK LANE, Defendant LARRY ALLEN, Defendant DENISE O'TOOLE, Defendant HOLLY JUSTICE, and other defendants as yet unnamed.

1. This is an action for damages that exceed $15,000.00.

2. Plaintiff, at all times material resided in Volusia County, Florida.

3. Defendant News-Journal is now and, at all times material to this action, was a corporation organized and existing under the laws of the State of Florida, with its principle place of business at 901 6th Street, Daytona Beach, Volusia County, Florida. Defendant publishes a daily newspaper with mutli-county circulation known as "The News-Journal" which is distributed in Volusia, Putnam, and Flagler counties in Florida.

4. Defendant DAVIDSON, at all times material herein, was and is a resident of Volusia County, Florida, and is the President, Chief Executive Officer, and Co-Editor of the News-Journal.

5. Defendant KANEY, at all times material herein, was and is a resident of Volusia County, Florida, and is the Publisher and General Manager of the News-Journal.

6. Defendant DUNKEL, at all times material herein, was and is a resident of Volusia County, Florida, and is the Executive Editor of the News-Journal.

7. Defendant LINDLEY, at all times material herein, was and is a resident of Volusia County, Florida, and is the Managing Editor/News and Editorial of the News-Journal.

8. Defendant DIX, at all times material herein, was and is a resident of Volusia County, Florida, and is the Editorial Page Editor of the News-Journal.

9. Defendant's DAVIDSON, KANEY, DUNKEL, LINDLEY and DIX, were in charge of, and responsible for, the contents of such newspaper, were in charge of

printing, publishing, and distribution of such newspaper, made the general policy, and advised editorial writers on the position the newspaper would take on a subject, and possessed the power to hire and discharge employees responsible for the operation of the newspaper; said defendants were the final arbiters on questions or disputes as to policy arising among the staff in the course of the operation of the newspaper, and had absolute control of the ultimate decision as to whether particular news articles might appear or might be withheld from publication in the newspaper.

10. Defendant HASTEROK, at all times material herein, was and is a resident of Volusia County, Florida, and is an editor for The News-Journal.

11. Defendant LANE, at all times material herein, was and is a resident of Volusia County, Florida, and is an associate editor for the News-Journal.

12. Defendant ALLEN, at all times material herein, was and is a resident of Volusia County, Florida, and is an editor for The News-Journal.

13. Defendant O'TOOLE, during 1996, at all times material herein, was and is a resident of Volusia County, Florida, and served on the editorial board that made election recommendations in 1996.

14. Defendant MOLLY JUSTICE, in 1998, was and is a resident of Volusia County, Florida, and still is employed by defendant News-Journal as a reporter for the News-Journal.

15. The defendant NEWS-JOURNAL and other named and unnamed defendants engaged in the practice

and policy of making election recommendations in 1996, 1998, and other election years.

16. In carrying out their practice and policy of making election recommendations, the defendant News-Journal and other named and unnamed defendants explain why they recommend as follows:

> "The News-Journal editorial board makes election recommendations in an effort to provide information that isn't readily available to many voters. The board invites candidates for an interview to learn about their character, background and opinions. Board members review files of news clippings on the candidates' records. The board also talks to people who know the candidates. Many voters have neither the time nor opportunity to make a thorough investigation of every candidate. Recommendation editorials are intended to give readers the benefit of the editorial board's research."

17. In 1996, Plaintiff was a candidate for the office of Public Defender for the Seventh Judicial Circuit, which includes Volusia County, Florida.

18. During the 1996 election, on November 2, 1996, the defendant News-Journal and other named and unnamed defendants caused to be published a recommendation editorial which contained defamatory and false statements about the plaintiff. A copy of the article is attached as Exhibit A.

19. On October 16, 1998, Plaintiff served on defendant News-Journal a written notice pursuant to Section 770.01 of the Florida Statutes specifying the 1996

statements that were false and defamatory. A copy of this notice is attached as Exhibit B.

20. In 1998, Plaintiff was a candidate for the office of Volusia County judge.

21. During 1998, the defendant News-Journal, and other named and unnamed defendants caused to be published an editorial and news articles which contained defamatory and false statements about the plaintiff. Copies of the editorials and articles are attached as Exhibits C, D, E and F.

22. On October 20, 1998, Plaintiff served on defendant News-Journal a written notice pursuant to Section 770.01 of the Florida Statutes specifying the 1998 statements that were false and defamatory. A copy of this notice is attached as Exhibit G.

23. On October 27, 1998, plaintiff attempted to contact defendant Dunkel by telephone at the News-Journal in order to ascertain the names of all of the editors who participated in the endorsement interviews of the plaintiff in 1996 and 1998. Dunkel refused to come to the telephone and speak with the plaintiff.

24. As of the date of filing of this complaint, defendant News-Journal has failed and refused to publish a correction or retraction.

25. The defendants published the false and defamatory statements maliciously, with knowledge that they were false, with serious doubts about their truth, and with reckless disregard for whether they were false or not.

26. The defendants published the false and defamatory statements without reasonable care whether the statements were true or false.

27. The false and defamatory statements which were published by the defendants constitute libel per se.

28. By reason of such publication and republication of the libelous material by the defendant, plaintiff has been, is, and will be, greatly injured in his good name and reputation, brought into public scandal and disrepute, and held up to the contempt, ridicule, and shame with and among friends and acquaintances, citizens of Volusia, Flagler, and Putnam counties, and parts of the State, and other persons in such areas and elsewhere presently unknown to plaintiff; such publication has injured and distressed, and will continue to injure and distress, plaintiff in his feelings, and has caused, and will continue to cause, him to suffer great pain, anguish, and humiliation; such publication has caused citizens and voters of such Volusia, Flagler, and Putnam counties, to fail to vote for, or to vote against, him in elections for public office in 1996, 1998, and in the future; and, such publication has affected, and will affect, the esteem and prestige with which he is held by members of the public in and about the areas in which such publication was circulated.

29. Defendants knew, or should have known, that such publication concerning the plaintiff would be repeated and that gossip and rumors affecting the reputation of the plaintiff would result naturally and proximately from such publication.

30. As a direct and proximate cause of the defamatory and false statements which were published by the defendants in 1998, Plaintiff was defeated in the 1998

election for Volusia County Judge by 430 votes out of a total of 28,918 votes.

31. Plaintiff also claims damages due to his defeat for election to the office of Volusia County Judge.

WHEREFORE, plaintiff requests judgment for general, special, and punitive damages against defendants vaccording to proof, for costs of suit, attorneys' fees, trial by jury, and for such other and further relief as may be just.

Dated 10/28/98

/s/ Kevin K. Carson
KEVIN KITPATRICK CARSON
KEVIN "KIT" CARSON, P.A.
315 South Palmetto Avenue
Daytona Beach, FL 32114
(904) 255-2273
Florida Bar No. 370711

EXHIBIT A

4A – THE NEWS JOURNAL Saturday, November 2, 1996

EDITORIAL PAGE

James Gibson
for public defender

James B. Gibson, 7th Judicial Circuit public defender, has run that office smoothly and quietly for 20 years. His ability to keep a low profile should be seen as a sign of satisfaction with his work. Under the leadership of Gibson, a Republican, the office has provided competent representation to poor people charged with crimes in Volusia, Flagler, Putnam and St. Johns counties.

[1.] Democratic challenger Kit Carson's complaint is less with the qualify of service Gibson provides than with Gibson's reluctance to try to squeeze more money out of the office's indigent clients. Public Defender's Office clients are required to sign an affidavit confirming their inability to pay an attorney. Though some potential for fraud exists, it is not great. Assistant public defenders have notoriously large case loads. With their freedom and reputations at risk, defendants who can afford to hire private attorneys are likely to do so.

[Picture Omitted in Printing]

[2.] There's merit in requiring public defender's clients who are not poverty stricken to pay something toward defense costs. But attempts by the court system to collect such payments should be handled outside the Public Defender's Office. Carson fails to see the conflicts of interest inherent in his proposal that assistant public

defenders argue *against* their clients before a judge to secure fees.

[3.] In addition to his misguided emphasis on fee collection, Carson lacks other important qualifications. He has no experience managing employees. He is unprepared for the largely administrative job.

[4.] Carson's record of employment in the justice system, which ended about six years ago, is unimpressive. He was an assistant public defender under Gibson for about a year. Before that, he was fired by the state Attorney General's Office in Daytona Beach in February 1988 for "allegedly refusing to perform the assigned work," according to state records. [5.] He was fired by the public defender in Florida's 3rd Judicial Circuit after only six weeks in 1985 for "unsatisfactory work performance," records show. Earlier in '85, he resigned after 15 months as an assistant state attorney in that circuit.

The Public Defender's Office mission is to ensure people get fair trials on criminal charges even though they can't afford private legal representation. Unless the rights of the poor are protected, nobody's rights are safe. Clients deserve a committed, dependable, experienced leader in the Public Defender's Office. Gibson is the better choice.

• RECOMMENDATION: **James B. Gibson** for public defender.

EXHIBIT B

LAW OFFICE OF

KEVIN "KIT" CARSON, P.A.

315 South Palmetto Avenue
Post Office Box 1211
Daytona Beach, Florida 32115

(904) 255-2273

October 16, 1998

Tippen Davidson
The News-Journal
901 6th Street
Holly Hill, FL 32117

HAND DELIVERY

Re: Notice of Defamatory Statements and Intent to Sue.

Dear Sir,

Pursuant to Section 770.01, Florida Statutes, you are hereby notified of the following statements in your editorial elections recommendations, printed on November 2, 1996, which are defamatory and false:

	Ref. No.
1. Kit Carson's complaint is less with the quality of service Gibson provides than with Gibson's reluctance to try to squeeze more money out of the office's indigent clients.	1
2. Carson fails to see the conflicts of interest inherent in his proposal that assistant public defenders argue against their clients before a judge to secure fees.	2

3. In addition to his misguided emphasis on fee collection, Carson lacks other important qualifications. He has no experience managing employees. He is unprepared for the largely administrative job. 3

4. Carson's record of employment in the justice system, which ended about six years ago, is unimpressive . . . he was fired by the state Attorney General's Office in Daytona Beach in February 1988 for "allegedly refusing to perform the assigned work," according to state records. 4

5. He was fired by the public defender in Florida's 3rd Judicial Circuit after only six weeks in 1985 for "unsatisfactory work performance," records show. 5

The editorial, as a whole, is libelous. It is my intention to sue you, your newspaper, and your editors. Thank you for you attention to this matter.

Sincerely,

/s/ Kit
Kevin Kitpatrick Carson

EXHIBIT C

DAYTONA BEACH NEWS – JOURNAL
August 24, 1998, page 1C

1 of 10-20-98 letter

Only one judge race will be a contest

By MOLLY JUSTICE
Staff Writer

DAYTONA BEACH – Although eight judges were up for re-election this fall, only one drew an opponent this time around.

Incumbent County Judge Freddie Worthen will be opposed by Daytona Beach criminal defense attorney Kit Carson on the ballot Sept. 1 for the Volusia County group 3 seat. The judgeship pays an annual salary of $98,448.

The last contested judicial election was in 1996 when incumbent judges William Johnson and Michael McDermott were opposed. Both sitting judges prevailed in that election.

Election '98

Other judges in the circuit who were up for re-election this year were unopposed. Those include: Circuit Judges Richard Orfinger, Joseph Will, James Foxman, Kim Hammond and Arthur Nichols; and County Judges Mary Jane Henderson and Stasia Warren.

Although judges and candidates for judgeships are required to follow campaigning restrictions outlined by the Canons of Judicial Ethics, Carson has brought to the forefront one main issue in this judicial race – lenient sentencing for drug offenses.

"I'm talking about stiff sentences for drug users and paraphernalia offenses," Carson said.

At the heart of Carson's campaign is a "zero tolerance" program where "those persons caught with illegal drugs or drug paraphernalia will be sentenced to jail! No excuses!"

Carson said that jail time is the only way to deter such offenders.

"Right now we have no deterrents," he said.

Carson attacked Worthen's "lenient sentencing," saying he sentences first-time drug offenders to a $125 fine and possibly court costs, drug treatment and/or evaluation.

However, Worthen said he has no concrete sentencing standard for first-time offenders. He said he uses the facts of the case and the offender's prior record when determining a sentence. "Each case brings its own sentence," he said.

Worthen said it's important for him to be fair and impartial when sentencing defendants.

"I try to make sure that everyone who comes before me gets a chance to speak," he said. "I spend a lot of time in making sure that people's rights are not violated . . . The defendant is the only person in that courtroom who may lose their liberty."

Sentences can range from paying a fine to serving jail time or a combination of several other options. Worthen said the maximum sentence issued for misdemeanor offenses in county court is one year in jail and/or a $1,000 fine. In most cases, he said attorneys negotiate the terms

of a sentence between themselves before bringing it to the court.

As part of Carson's "zero tolerance" program, he suggests first-time offenders be punished with jail time, probation and rehabilitation if necessary. However, Carson would not say what was adequate jail time.

And although his campaign literature proclaims those caught with illegal drugs or paraphernalia will be sentenced to jail, "No excuses!" Carson said he will listen to defendants.

"I'm not going to put everybody in jail," he said. "I have an obligation to listen and I will listen."

However, he added that offenders will have to give him a reason and not an excuse to forgo jail time.

Worthen believes Carson's campaign promises and "zero tolerance" program would weigh down the justice system and cause serious jail overcrowding.

"This is going to fill up the Volusia County Branch Jail real fast if you're going to send everybody on that," Worthen said.

Carson said if taxpayers don't want to spend money to build new jails, the county could house inmates on cots in the cafeteria, erect tents or have them sleep in shifts like the military.

"Building jails is a responsibility of the County Council, not the county court," he said.

Worthen also feels that Carson's promises may lead defendants and their attorneys to believe Carson is prejudiced and biased. Those who believe Carson is biased

will request another judge – creating a heavier caseload for other judges.

Worthen said if Carson put all offenders in jail, more defendants would demand jury trials instead of accepting plea bargains. He said it will take longer to hear cases at trial because of the sheer number of them, and once they get to trial – witnesses may be gone or can't remember the events accurately and justice wouldn't be done.

Carson said his campaign promises would not force him to recuse himself from cases. He referred to case law that said a judge who sentences drug violators more heavily than others does not indicate bias against any particular person – only the crime itself. However, the case does not involve a judge who made campaign promises before an election.

Worthen is a 63-year-old Seville native who received his bachelor's degree in biology from Florida A&M University in Tallahassee before entering the Army in 1963. After serving 22 years in the Army, Worthen retired as a lieutenant colonel and entered law school. In 1978, he received his law degree from Howard University in Washington, D.C., and returned to the Daytona Beach area.

Worthen spent a year in private practice before joining the State Attorney's Office in 1982. During his seven years as a prosecutor, he received excellent and satisfactory performance evaluations.

Worthen was appointed to the bench in 1989 by Gov. Bob Martinez and was unopposed in 1990 and 1994 elections. He applied for a circuit judgeship in 1991, but the position was given to Joseph Will.

He and his wife, Frances, have two grown daughters and live in Port Orange.

Worthen's opponent received his bachelor's degree in criminal justice from the University of Florida in Gainesville in 1976. Before law school, Carson, 44, was a corrections officer at Union Correctional Institution in Ralford for about two months. He also worked for the city of Gainesville as a traffic enforcement technician, security officer and police officer.

Prior to entering private practice in 1990, Carson worked for the Public Defender's Office in Daytona Beach for two years under James Gibson. In 1989, he received an above-satisfactory evaluation for his work as an assistant public defender. He later ran unsuccessfully against Gibson in 1996.

Since receiving his law degree from UF in 1982, Carson also worked as an assistant public defender in Lake City, assistant state attorney in Tavares and assistant attorney general in Daytona Beach.

[1(a)] According to public records, Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. He worked there for a month in 1985.

[1(b)] Carson also worked at the local Attorney General's Office for more than two years before he was dismissed in 1988. A 1986 evaluation said Carson achieved performance standards and exceeded in several areas such as professional attitude and cooperation. However, his next evaluation said he barely achieved performance standards and rated below average on professional attitude and cooperation.

During a recent interview, Carson became emotional when talking about the dismissals and attributed them to "political shenanigans."

Carson also has a pending case before the Florida Supreme Court that stems from a complaint made by the Florida Bar that alleges he violated a bar rule about fee-sharing. Although Carson has not been disciplined by the bar, a judge recommended that Carson pay the costs of the legal matter and attend ethics school. He is contesting that finding.

Carson is single and lives in Daytona Beach.

EXHIBIT D

4A – THE NEWS – JOURNAL Saturday, August 29, 1998

EDITORIAL PAGE

Worthen should continue as Volusia County judge

In the case of Worthen vs. Carson for County Court, Carson ought to plead no contest.

Kit Carson fails to make any case for replacing incumbent Freddie Worthen, his campaign raises ethical concerns and his fixation on jailing every marijuana user is misdirected.

County courts are where most people deal with lesser legal problems like traffic tickets, animal control charges and small civil cases. County judges also decide

cases involving violations of city or county ordinances. Once in a while, a county judge may sit in as an acting circuit judge.

[Picture Omitted in Printing]

The judge on a county bench often spends a lot of time protecting the rights of people who appear in court and helping them understand the system. Temperament is as important as knowing the law. Fairness and experience helping people resolve their problems are vital qualities.

These qualities give Worthen a significant advantage for re-election to the Volusia County Group 3 seat. All registered voters can cast ballots in this countywide, nonpartisan race.

Carson, a Daytona Beach criminal defense attorney, has worked briefly as an assistant state attorney in Daytona Beach and assistant public defender in Volusia County.

Worthen, appointed by Gov. Bob Martinez, has served nine years and is seeking a third term. He says he intends to retire at the end of that term, before he reaches the mandatory retirement age of 70.

The Canons of Judicial Ethics restrict what candidates can say about issues. Worthen follows those guidelines by emphasizing the qualities he brings to the position, particularly hard work and impartiality.

Carson, however, has pledged a "zero tolerance" crusade to put drug dealers and even first-time drug users [3(a)] in jail, a kind of "Maximum Kit" approach. This campaign promise comes uncomfortably close to violating judicial ethics guidelines on prejudging cases, a concern expressed by Judge Charles Kahn of the 1st

District Court of Appeal. Kahn sits on the Florida Judicial Ethics Advisory [3(b)] Committee. Carson simply blows off any ethical concerns by asserting free-speech rights.

[3(c)] Carson's anti-drug pledge also is misleading because county judges hear cases involving possession of only small amounts of marijuana or drug paraphernalia. Major drug cases are tried in Circuit Court.

[3(d)] Florida's judicial ethics also bar candidates from asking for donations. Yet Carson's own campaign brochure, paid for by Carson as treasurer, asks people to "Contribute funds to the Kit Carson for Judge Campaign." Carson's "zero tolerance" looks more like "zero ethics."

Let the ballot show a finding in favor of Worthen for County Court.

• RECOMMENDATION: **Freddie Worthen**, County Court Group 3.

EXHIBIT E

6H – THE DAYTONA BEACH SUNDAY NEWS-JOURNAL August 30, 1998

Primary Election '98

Worthen faces defense attorney for judgeship

By MOLLY JUSTICE
Staff Writer

DAYTONA BEACH – It will be up to Volusia County voters to decide whether an incumbent county judge will serve another four years on the bench.

In Tuesday's primary, County Judge Freddie Worthen faces local criminal defense attorney Kit Carson for the county judge group 3 seat. The judgeship, which Worthen has held the past nine years, pays an annual salary of $98,448.

Other judges who were up for re-election this year drew no opponents. Those unopposed judges include: Circuit judges Richard Orfinger, Joseph Will, James Foxman, Kim Hammond and Arthur Nichols; and County judges Mary Jane Henderson and Stasia Warren.

Worthen is a Seville native who served as a U.S. Army officer for 22 years after receiving his bachelors degree from Florida A&M University in Tallahassee. In 1975, he retired from the Army as a lieutenant colonel and later earned his law degree from Howard University in Washington D.C.

Before returning to the Daytona Beach area in 1981, Worthen worked for a lawyers' fellowship program and the National Bar Association.

He spent a year in private practice here before joining the State Attorney's Office in 1982. Worthen was an assistant state attorney when Gov. Bob Martinez appointed him to the county judge seat in 1989. He was unopposed in 1990 and 1994.

He and his wife, Frances, have two grown daughters.

Worthen's opponent, Carson, received both his bachelors and law degrees from the University of Florida

in Gainesville. Before entering into private practice in 1990, he worked for several public agencies, including: the Department of Corrections; State Attorney's Office in Tavares; Gainesville Police Department; Public Defender's Office in Lake City and Daytona Beach; and local Attorney General's Office.

In the mid to late 1980s, Carson was discharged or dismissed from his jobs with the Public Defender's Office in Lake City and the [2(a)] Attorney General's Office in Daytona Beach. Public records show Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. Carson was discharged for allegedly refusing to perform the assigned work, records show. However, the Attorney General's Office did not substantiate this allegation to state unemployment officials.

Carson calls the dismissals "political shenanigans."

The Florida Bar also has a case pending against him in the state Supreme Court that charges him with violating a bar rule about fee-sharing. Carson is contesting this case.

During his eight years as a local defense attorney, Carson said he's seen lenient sentencing of drug offenders by the local judiciary. In county court, the most common drug offenses are possession of marijuana under 20 grams and possession of drug paraphernalia. More serious drug crimes – such as trafficking, sale and delivery of a controlled substance and possession of cocaine – are felony offenses and are heard in circuit court.

Carson's campaign centers around a "zero tolerance" program that promises that "those persons caught with

illegal drugs or drug paraphernalia will be sentenced to jail! No excuses!"

"The federal government can't win the drug war alone. The county and state judiciary is going to have to join in the fight," he said.

However, Worthen said he has no concrete sentencing guidelines for first-time drug offenders. He said he listens to the facts of each case and considers the defendant's prior record when sentencing someone. Worthen said he wants to hand down fair and impartial punishments.

[2(b)] The judge also feels that Carson's promises create an appearance that he's predisposed about drug cases and that defendants would not be subjected to a fair and impartial judiciary if Carson were elected county judge.

"If people lose confidence in that judiciary, I think we're going to be in trouble," Worthen said.

And although some critics believe Carson's strong anti-drug sentiment may violate the Canons of Judicial Ethics, Carson does not think he violated the canon restricting judicial campaigning and said he has a First Amendment right to free speech.

[Picture Omitted In Printing]

Volusia County
Judge, Gp. 3
(nonpartisan)

Name: Kit Carson
Residence: Daytona Beach
Age: 44
Occupation: Criminal defense attorney

Elected office: None.
Name: Freddie Worthen
Residence: Port Orange
Age: 63
Occupation: County Judge since 1989
Elected Office: Appointed judge in 1989, then unopposed in 1990, 1994.

EXHIBIT F

6A – THE NEWS-JOURNAL Wednesday, September 2, 1998

Election '98

Worthen re-elected in close race

By MOLLY JUSTICE
Staff Writer

DELAND – Incumbent Volusia County Judge Freddie Worthen won re-election by a slim margin Tuesday, but he may face a recount.

With absentees and totals from the county's 168 precincts, Worthen received 14,674 votes to challenger Kit Carson's 14,244 votes.

Worthen look 50.74 percent of the ballots cast in the race while Carson's total was 49.26 percent.

Because the margin of victory was only 1.48 percent, the possibility exists that Carson could ask the county's canvassing board for a recount. He could not be reached for comment late Tuesday.

A recount is not automatic unless the victory margin is less than one-half of one percent.

The race was close throughout the night with Worthen leading Carson, a Daytona Beach defense attorney, the majority of the time by 2 to 3 percentage points.

Worthen, 63, of Port Orange, waited for the results with his wife and friends inside County Council chambers in Deland.

"I hope we have enough of a lead to prevail," Worthen said while waiting for the absentee totals.

The absentee votes, however, pushed Carson's total closer to Worthen's.

"I didn't think it would be that close," Worthen said. He said he was surprised by the results after having been endorsed by the area's major newspapers.

This was the first time Worthen was opposed for election since being appointed to the bench in 1989. He won elections in 1990 and 1994 without opposition.

He and a handful of supporters spent the day holding signs at major intersections on the east side of Volusia County.

Worthen said campaigning in this election was hard because judicial ethics dictated he not ask for contributions or make promises.

"There's a lot of things I couldn't say," Worthen said.

Carson, however, mounted a strident campaign in which he intimated that Worthen was lenient on drug offenders.

Carson, 44, pledged "zero tolerance" for anyone caught with drugs or paraphernalia, and promised automatic jail sentences.

Worthen is a Seville native who retired as a lieutenant colonel after 22 years in the Army and entered law school. He received his law degree in 1978 from Howard University in Washington, D.C., and returned to the Daytona Beach area. He spent a year in private practice before joining the State Attorney's Office in 1982.

Carson received a law degree from the University of Florida in 1982, and worked for the Public Defender's Office in Daytona Beach for two years under James Gibson. He ran unsuccessfully against Gibson in 1989 and 1996. Carson also worked for the Public Defender's Office in Lake City briefly in 1985 before being discharged for unsatisfactory work performance. Carson worked for the local office of the state attorney general for more than two years before being discharged in 1988 after a poor work evaluation. [4(a)]

[Picture And Caption Omitted In Printing]

EXHIBIT G

LAW OFFICE OF
KEVIN "KIT" CARSON, P.A.

October 20, 1998

315 SOUTH PALMETTO AVENUE
POST OFFICE BOX 120
DAYTONA BEACH, FLORIDA 3205

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(904) 255-2270

Tippen Davidson
The News-Journal
901 6th Street
Holly Hill, FL 32117

HAND DELIVERY

Re: Notice of Defamatory Statements and Intent to Sue.
Dear Sir,

Pursuant to Section 770.01, Florida Statutes, you are hereby notified of the following articles and statements in your newspaper which are defamatory and false:

1. Only one judge race will be a contest. August 24, 1998, page 1C.

   (a) According to public records, Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. He worked there for a month in 1985. 6

   (b) Carson also worked at the local Attorney General's Office for more than two years before he was dismissed in 1988. A 1986 evaluation said Carson achieved performance standards and exceeded in several areas such as professional attitude and cooperation. However, his next evaluation said he barely achieved performance standards and rated below average on professional attitude and cooperation. 7

2. Worthen faces defense attorney for judgeship. August 30, 1998, page 6H.

   (a) In the mid to late 1980s, Carson was discharged or dismissed from his jobs with the Public Defender's Office in Lake City and the Attorney General's

Office in Daytona Beach. Public records show Carson was discharged from the Public Defender's Office in Lake City for unsatisfactory work performance. Carson was discharged for allegedly refusing to perform the assigned work, records show. 8

(b) The judge also feels that Carson's promises create an appearance that he's predisposed about drug cases and that defendants would not be subjected to a fair and impartial judiciary if Carson were elected to county judge. 9

3. Worthen should continue as Volusia County judge. August 29, 1998, page 4A. (Editorial Recommendation)

(a) This campaign promise comes unconfortably close to violating judicial ethics guidelines on prejudging cases 10

(b) Carson simply blows off any ethical concerns by asserting free-speech rights. 11

(c) Carson's anti-drug pledge is also misleading 12

(d) Florida's judicial ethics also bar candidates from asking for donations. Yet Carson's own campaign brochure, paid for by Carson as treasurer, asks people to "Contribute funds to the Kit Carson for Judge Campaign." Carson's "zero tolerance" looks more like "zero ethics." 13

4. Worthen re-elected in close race. September 2, 1998, page 6A.

   (a) He ran unsuccessfully against Gibson in 1989 and 1996. Carson also worked for the Public Defender's Office in Lake City briefly in 1985 before being discharged for unsatisfactory work performance. Carson worked for the local office of the state attorney general for more than two years before being discharged in 1988 after a poor work evaluation. 14

The editorial and articles, as a whole, are also libelous. It is my intention to sue you, your newspaper, your reporter, and your editors. Thank you for your attention to this matter.

Sincerely,

/s/ Kit

Kevin Kitpatrick Carson